No. 16389

United States Court of Appeals

FOR THE

Ninth Circuit

THE STATE OF NEVADA, EX REL. HUGH A. SHAMBERGER, STATE ENGINEER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

STATEMENT RE ISSUES

The Appellee in its answering brief herein rests its case upon the sovereignty of the United States, maintaining that no suit for declaratory judgment will lie under the Consent to Suit Act and by reason thereof the Court had no jurisdiction. The Lower Court, however, did assume and retain jurisdiction and rendered a declaratory judgment in favor of the Appellee and pursuant to such declaration dismissed the suit.

As pointed out in Appellant's opening brief, page 39 et seq., the opinion of the Lower Court discloses a meager interpretation of the Consent to Suit Act, notwithstanding the language written into the Act by Congress that the United States shall be deemed to have waived any right to plead that it is not amenable to State

law by reason of its sovereignty, the Court premised its opinion and decision on such sovereignty.

The Appellant submits that the Court's interpretation of the Act was unduly restrictive and not consistent with the intent of Congress that sovereignty itself of the United States was not to be a bar to the application of the State water laws. It needs no citation of authority to show that it would indeed be a rare case in which the soveriegn power of the United States could not be invoked.

The Appellant in perfecting its appeal herein is cognizant of the fact that the interpretation of the Act in question is of paramount importance. In effect, it is one if not in fact the major issue. It is a question dealing with the interpretation of an Act of Congress enacted pursuant to its constitutional power set forth in Article IV, Section 3, Clause 2 of the Constitution. This power of Congress is without limitation. Alabama v. Texas, 347 U. S. 372.

In United States v. San Francisco, 310 U.S. 16, the Court, referring to the Property Clause of the Constitution, said it "provides that The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory and *other property* belonging to the United States. The power over the public land thus intrusted to Congress is without limitation. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." (Italics supplied.)

The term "public lands" as construed in the Pelton Dam case is not determinative in every case relating to the property in lands or waters thereon owned or claimed by the United States. In fact all lands and other property is publicly owned and held in trust therefor by the United States Government. The people of

this Nation wrote into their Constitution and granted to the Congress the power to dispose of and make all needful rules and regulations respecting the public property. Kansas v. Colorado, 206 U. S. 46. The Act waiving immunity contains no provision limiting its effect to any land classification, public, reserved or otherwise.

JURISDICTION

The Appellant State of Nevada, plaintiff below, as parens patriae of its people and also of the Town of Hawthorne, County seat of Mineral County, believing that its sovereign rights to the control and use of the waters for beneficial consumptive use within its borders had been most seriously impugned by the United States, as alleged in its Complaint (R–1–19), sought to obtain a judicial interpretation of its rights as well as the rights of the United States and the effect thereon of the Consent to Suit Act and the Pelton Dam case, with the view that a judicial declaration of the rights of the respective parties could well serve to settle for the future the rights thereof.

It is submitted that a judicial interpretation of the Consent to Suit Act is necessary. It is thought by many authorities that the decision rendered in the Pelton Dam case is of far-reaching effect. However, it is submitted that Congress in said Act evidenced its intent that the historic policy of Federal noninterference with State water law should be the rule of decision, even as to the Federal Government.

The suit was commenced in the State Court pursuant to and based upon Section 9440, Nevada Compiled Laws, 1959 (NRS 30.030) and the Consent to Suit Act. R–1–17.

The Supreme Court of Nevada in Kress v. Corey, 65 Nev. 1, 189 Pac. 2d 352, construed the statute to open the door to

adjudication of innumerable complaints and controversies not theretofore open to judicial relief and permits Courts to vindicate challenged rights, clarify and stabilize unsettled legal relations and remove legal clouds which create insecurity and fear, and that to obtain a declaratory judgment, justiciable controversy must exist. This pronouncement of the Nevada Court squares with the views of the Supreme Court in Aetna Life Ins. Co. v. Haworth, 300 U. S. 227; Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U. S. 270.

That there is a controversy between the parties, a sovereign controversy so to speak, is self-evident. Certainly the Federal Declaratory Judgment Act sanctions the declaration of the rights and other legal relations of any interested party. And "such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

At pages 12 et seq., of its brief, Appellee strenuously contends that the Lower Court had no jurisdiction of the United States or the subject matter of the action upon the main ground that the United States had not consented to be joined as a defendant in the instant suit which seeks a declaratory judgment, and upon the additional ground that no justiciable controversy is presented. The Appellee most earnestly so argued to the Lower Court, yet such Court retained jurisdiction and reached a decision declaring that the rights of the United States were paramount to those claimed by the State. In brief, a declaratory judgment was rendered in a matter of grave importance relative to the consumptive use of the waters of the Arid West.

The Federal Declaratory Judgment Act is an enabling Act conferring discretion on the Courts as to its use. Public Service Com. v. Wycoff, 344 U. S. 337. The extent to which declaratory judgment procedure is used in the Federal Courts to control

State action lies in the sound discretion of the Court. Alabama State Federation of Labor v. McAdory, 325 U. S. 450. The Lower Court certainly exercised its discretion.

The Appellee contends here that jurisdiction under Section 666 could not attach save all other interested parties were joined in the action. In brief, that only general adjudication suits were and are contemplated by the Act. Brief, pp. 27, 28, 81–84, McCarran Letter, Appendix 89. The same contention was submitted to the Lower Court. That Court, however, did not agree with such construction. To the contrary the Court was of the opinion that the section goes further, and posed the question whether "the State of Nevada and the United States be parties to a controversy concerning it solely between themselves." Counsel for defendant demurred to the Court's discussion of the question—maintaining their construction of the Act. The Court replied "the government has put it in issue by saying 'we have taken it by our inherent sovereign right.' Is there a judicial issue then between the two, the State's theory and the Government's theory for administration of that water?" Tr. January 14, 1957, pp. 52–56.

The record herein discloses that the suit was removed to the Federal District Court by the Appellee; that the Appellant moved to remand, which was denied; that Appellee answered the complaint so removed to the Federal Court after such removal; that Appellee's Motion for Summary Judgment was denied. Supp. R–109–112.

The Opinion of the Lower Court demonstrates that the Court determined there was a justiciable controversy between the United States and the State within the purview of Section 666 and that the Court possessed the jurisdiction thereunder to render a decision.

The truth of the matter is that the case in the Lower Court

resolved itself into a contested question of law between two sovereign entities. One sovereign in national affairs but whose property and property rights are subject to the will and control of the Congress. The other, endowed by law, custom and Federal recognition with the right to control the appropriation and use of the nonnavigable waters within its borders. Tr. January 14, 1957, p. 25 et seq.

Surely under the facts and circumstances of this case a declaration of the rights of the soveriegn parties was and is well within the purview of the Declaratory Judgment Act and the law as developed thereunder, irrespective of whether the Town of Hawthorne was joined as a party. The State certainly was and is here as parens patriae. A doctrine the Appellee has encountered many times in Arizona v. California et al. No. 9 Original, Supreme Court of the United States.

In maintaining the jurisdiction of the Lower Court herein, the Appellant does not concede that the Court's interpretation of the law and the resulting overriding sovereignty of the Appellee is correct.

The Appellant has not here appealed from the Order denying remand and, of course, cannot and does not now raise the question. However, in view of the contention of the Appellee that Section 666 cannot be invoked save upon the joinder of all parties to water right adjudication proceedings *with the consequent jurisdiction thereof in the Federal Courts*, it is submitted that there is respectable authority to the contrary. The Court in In re Green River Drainage Area, 147 Fed. Supp. 127, District of Utah, after exhaustive examination of the case wherein all parties were joined, remanded the cause to the State Court.

Congress in the Enactment of the Consent to Suit Act Evidenced Its Intent That in the Interest of Comity Between

the United States and the States the Historic Policy of Noninterference With State Water Laws Shall Be Binding Upon the Federal Government in the Appropriation to Its Beneficial Consumptive Use of the Nonnavigable Waters Within a State.

The Appellee, in its voluminous brief, goes far afield in the endeavor to escape the meaning and effect of the Consent to Suit Act, and then at page 81 admits the clear purpose of the Act by saying:

> "Section 666 is not a substantive law. Its purpose was solely to remove the sovereign immunity of the United States from suits for the adjudication or administration of rights to use the waters of a river system or other source, simply because without such waiver of immunity it was impossible in many areas of the West to obtain a final adjudication. The language of the statute makes this clear."

Whether Section 666 is a substantive law is debatable. In any event, at least, it creates and provides the right of a state, entity or individual to summon the United States in a judicial proceedings for the purpose of determining the valuable rights to the beneficial consumptive use of waters of any source.

The Appellant is in agreement that until the enactment of Section 666 "Congress has (had) not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are (were) drawn in question" and that "bill (S 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." Long ago the Supreme Court held that statutes granting consent to bring suit against the United States must be read "according to the natural and obvious import of the language, without resorting to subtle or forced construction for the purpose of either limiting

or exempting its operation," Moore v. United States, 249 U. S. 487. Miller v. Robertson, 266 U.S. 243; Canadian Aviator, Ltd., v. United States, 324 U.S. 222; United States v. Aetna Casualty and Surety Co., 332 U.S. 366.

Appellant notes the argument of Appellee at pages 82–85 of its brief, the gist of which is that notwithstanding the explicit language of the Act, "The United States when a party to any such suit, shall be deemed to have waived any right to plead that the State laws are inapplicable, or that the United States is not amenable thereto by reason of its sovereignty," nevertheless it constitutes in effect a disposal of the properties of the United States and/or its constitutional powers by ambiguous means. In brief, while Section 666 provides that the United States shall be deemed to have waived any right to plead that the State laws are inapplicable, still the concomitant provision "or that the United States is not amenable thereto by reason of its sovereignty," is of non effect. If such interpretation of the Act is correct, it is submitted that the Act will have failed to carry out the intent of Congress to institute order in lieu of chaos in the appropriation and administration of the water rights of the Arid West.

Congress, in the enactment of Section 666, had in mind the interest of comity between the United States and the States consistent with the historic policy of the United States of Federal noninterference with State water law, a policy that had its inception more than ninety years ago and pursuant to which the great body of State water law in the Arid Western States has been premised and administered.

At pages 14 et seq., of its brief, Appellee contends that the State cannot exercise its police power over the waters in question, stating, inter alia, "Contrary to the implications of Appellant's opening brief (see particularly the Appendix thereto),

there is no law of the United State applicable here similar to Section 8 of the Reclamation Act of 1902 (43 U.S.C. 383) directing conformity to State law." The appellant dissents. Congress has recently enacted just such laws expressly applicable to a naval reservation, and reservations for national defense purposes.

That Congress consistently relied and relies upon the historic policy of Federal noninterference with State water law is most aptly shown in United States v. Fallbrook Public Utility District, 165 Fed. Supp. 806, decided August 5, 1958, citing numerous Federal Acts so providing in Note 1, pages 841–842, and also directing attention to the Federal Act of July 28, 1954, 68 Stat. 577, relating to the DeLuz Dam on the Santa Margarita River for the use of the Department of the Navy in connection with a naval reservation known as Camp Pendleton. Section 2(a) of the Act provides:

> "In the interest of comity between the United States of America and the State of California and consistent with the historic policy of the United States of America of Federal noninterference with State water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriative water rights required under the laws of the State of California as soon as he is satisfied, with the advice of the Attorney General of the United States, that such action will not adversely affect the rights of the United States of America under the laws of the State of California."

And in Section 3(c) it is provided:

> "For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California * * *."

The same Court said at page 842, "Also particularly pertinent is Act of July 10, 1952, Ch. 651, Title 2, Sec. 208, 66 Stat. 560, 43 U.S.C.A. 666."

Congress in 1958 enacted "An Act to provide that withdrawals, reservations, or restrictions of more than five thousand acres of public lands of the United States for certain purposes shall not become effective until approved by Act of Congress, and for other purposes," approved February 28, 1958, 72 Stat. 27. This Act provides "except in time of war or national emergency hereafter declared by the President or the Congress, on and after the date of this Act, the provisions hereof shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States * * *. Section 1.

Section 2 provides, inter alia, "No public land, water, or land and water, shall except by Act of Congress, hereafter be (1) withdrawn from settlement, location, or entry for use of the Department of Defense for defense purposes; (2) reserved for such use; or (3) restricted from operation of the mineral leasing provisions of the Outer Continental Shelf Lands Act, if such withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense since the date of the enactment of this Act * * *."

Section 3 provides, inter alia, "Any application hereafter filed for withdrawal, reservation, or restriction, the approval of which will, under Section 2 of this Act, require an Act of Congress, shall specify—(8) if effecting the purpose for which the area is proposed to be withdrawn, reserved, or restricted, will involve the use of water in any State, whether, subject to existing rights under law, the intended using agency has acquired, or proposes to acquire, rights to the use thereof in conformity with State laws

and procedures relating to the control, appropriation, use and distribution of water."

It is clear that the aforesaid Acts were enacted pursuant to the Property Clause of the Constitution and that Congress therein made certain that the well-established rule of Federal noninterference with State water laws should be strictly adhered to. Particularly is such admonition of Congress pertinent to the case at bar in view of the strenuous contention of the Appellee with respect to alleged State interference with national defense.

The issue of Federal noninterference with State water law received the earnest consideration in United States v. Fallbrook Public Utility District, herein above cited. The Court, in the course of its opinion, exhaustively analyzed every facet of the question. At page 846 the Court stated the conclusions to be drawn therefrom, i.e., that where Congress has intended the Federal Government or its agencies to take or use water rights, it has spoken expressly, but that no Act of Congress had specifically said that the United States, through an executive department, might take or use unappropriated waters on a military reservation in derogation of State laws. The Court then said, "We fail to see how Congress, by any of its actions, has so exercised the power vested in it under the Property Clause, to empower any Executive agency to use, take or appropriate unappropriated water for military reservations." Most certainly the Court there invoked the historic policy of Federal noninterference with State water law.

It is submitted that the many years of the application of such historic policy, long sanctioned by the Congress, has laid the foundation broad and deep for the appropriation and use of the nonnavigable waters in accordance with the laws of the State and that the enactment of the Consent to Suit Act was for the very purpose of enforcing such policy.

THE POLICE POWER

The laws of the State of Nevada governing the right to appropriate to beneficial consumptive use the waters of the State were enacted under its police power for the conservation of its natural resources. Such power is well stated in 11 Am.Jur. 1034, Sec. 276:

> "The state, in the exercise of its power to enact laws for the general welfare of its people, may enact laws designed to increase the industries of the state, to develop its resources, and to add to its wealth. The majority of the authorities, moreover, support the rule that not only adjoining landowners, but the public at large, have an interest in the preservation of the natural resources of the country sufficient to justify appropriate legislation to prevent exploitation or waste of such resources by the owners of the land on which they are found. This rule finds specific expression in laws forbidding any waste of natural gas, oil, or mineral waters and subterranean flows and in laws forbidding the cutting of standing trees or the removal of stone, gravel, and sand from the seashore. The general rule applies to prevention of waste which would be detrimental to the public, as distinguished from an injury to an individual * * *."

That Congress over the period of many years has been cognizant of the necessity of the conservation of water in the Arid West and that the appropriation to use and control thereof by law was of vital importance, not only to the economy of a particular State but also as a contribution to the welfare of the country as a whole.

It may well be that Congress long ago possessed, or even today possesses, the power to legislate with respect to the beneficial consumptive use of waters on the public lands or reservations to the exclusion of the States, but, it has not so legislated, to the contrary it has sanctioned the control of such waters by the States

and in numerous Acts has directed the officers and agents of the United States to comply with State law in the appropriation to beneficial consumptive use of its waters. In brief, Congress has not foreclosed the exercise of police power of the State where the right to the beneficial consumptive use of water is drawn in question.

It is submitted that the Consent to Suit Act, in effect, constitutes an assimilation of State water laws in all cases where the rights of the United States are drawn in question in the adjudication thereof, or for the administration of such rights, where it appears that the United States is the owner of or in the process of acquiring such rights by appropriation under State law by purchase, exchange or otherwise.

The Act in question is analogous to the Assimilative Crimes Act, 18 F.C.A. 13, making applicable to Federal enclave the criminal laws of the State in which the enclave was situated. This Act was construed in United States v. Sharpnack, 355 U.S. 286, and held constitutional. Inter alia, the Court said:

> "Congress retains power to exclude a particular State law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of the State and Nation in the field of police power where it is especially appropriate the Federal regulation of local conduct conform to that already established in the State."

It is submitted that Congress undoubtedly was well advised and was of the opinion that the State water laws had long been the well-established regulation of the use of a most vital natural resource, and that in keeping with its historic policy has determined that it is especially appropriate that the regulation of Federal beneficial consumptive uses of water shall conform to the regulations already established in and by the State. And in so

legislating has not limited the application of the Act to waters situate on or in any classification of land, public, reserved or otherwise.

THE GROUND WATER EXPLORATORY ACT OF OCTOBER 22, 1919, 43 F.C.A. 351–360.

The Appellee, at page 68 et seq., of its brief, contends that the Desert Land Act does not transfer ownership of the unappropriated waters on public lands to the States. This contention, however, is not sustained by the historic policy over the period of many years that by statutory enactment and judicial interpretation the waters on such lands were subject to appropriation under the laws of the States where found.

The Exploratory Act, above cited, relates to desert land within Nevada and provides that the Secretary of the Interior may grant permits to citizens to prospect for ground water on areas of public land designated by the Secretary for disposal under said Act. If the citizen should develop water in accordance with the terms of the Act, a patent would be issued for one-fourth of the land designated in the permit. The Appellee points to this Act as placing the Secretary of the Interior in complete jurisdiction over the development of ground waters on unreserved public lands in Nevada.

The Appellant dissents. First, there is no evidence in this case that any person had acquired the right to so develop such water. Second, that since the 1939 ground water act of Nevada any such right when drawn in question would be subject to adjudication under Nevada law as to its standing as a valid right thereunder. Most certainly when such land passed into applicant's control the jurisdiction of the Secretary of the Interior ceased.

Lastly, in 1919 Nevada possessed no statutory law pertaining to percolating waters. In 1939 it did assume control thereover and required the appropriation thereof in accordance with its terms, a law which the officers of Appellee strictly complied with in the case at bar. R–7–15. A law that Congress has said shall not be deemed inapplicable by the United States when its rights are drawn in question.

CONCLUSION

With due respect to all and notwithstanding the contentions of the Appellee to the contrary as set forth in its brief, the Appellant respectfully submits that the legislative history of and the language in the Consent to Suit Act demonstrates that Congress intended that the historic policy of Federal noninterference with the State water laws should be the rule and not the exception.

The Act contains no exception to the application of its provisions to or on any lands of the United States or reservations thereof. In brief, Congress recognized the doctrine of the separation of the water from the land, i.e., the Colorado doctrine, and made it applicable to the appropriation of water by the United States wherever situate.

The record herein shows without contradiction that the United States was in the process of acquiring a water right by appropriation under State law, and in fact its officers had perfected such right and put the water to beneficial use in strict accord with such law. Then just before taking the final step in perfecting the title to the water right, i.e., the mere filing of proof of placing the water to beneficial use, refused to so file upon the authority of the Pelton Dam case, a decision construing a Federal statute

that contains an admonition of Congress that Federal noninterference with State water laws was still the policy of the law. Sec. 27, Fed. Power Act. This admonition was recognized by the Court in its opinion. It cannot well be claimed that the officers of the United States could have appropriated to beneficial consumptive use of the waters there upon the reservation of land theory without compliance with the State law. And since the enactment of the Consent to Suit Act it is submitted that any such rights so acquired, without such compliance, would be subject to attack by the State or other interested entity.

The Appellant respectfully submits, in the final analysis of the facts and circumstances herein, it is clear that the case has resolved itself into a justiciable controversy of law. A controversy that requires the judicial interpretation of the Consent to Suit Act and its effect on, and application to, the diametrical opposing theories of the Appellee and Appellant.

The Appellee's basic defense is the overriding sovereignty of the United States irrespective of the express language to the contrary in the Act. The Appellant relies upon the express intent of Congress that the United States when its rights are drawn in question according to the terms of the Act shall be deemed to have waived its right to plead the State laws are inapplicable and that it is not amenable thereto by reason of its sovereignty.

Congress may repeal the Act tomorrow. It may amend it in any respect. It may make it applicable to certain specified lands. But, until Congress does so amend it, it is submitted that the Act contains no language that limits its applicability to nonreserved lands. It is further submitted that Congress was well advised of the interlocking character of rights to the beneficial consumptive use of water of any source and intended that the rights of the United States were to be so treated.

The Appellant respectfully submits that the opinion and decision of the Lower Court, particularly as to the interpretation and effect of the Consent to Suit Act and the overriding sovereignty of the United States, was in error and that the judgment thereon should be reversed.

Respectfully submitted,

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